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 TETON COUNTY, WYOMING
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 Clerk of District Court

Frederick J. Harrison #5-1586
 FREDERICK J. HARRISON, P.C.
 1813 Carey Avenue
 Cheyenne, Wyoming 82001
 (307) 324-6639

Denise M. Harle, GA Bar No. 176758*
 ALLIANCE DEFENDING FREEDOM
 1000 Hurricane Shoals Rd NE, Suite D-1100
 Lawrenceville, GA 30043
 (770) 339-0774
 dharle@adflegal.org

Attorneys for Proposed Intervenors Rep. Rachel Rodriguez-Williams, Rep. Chip Neiman, Secretary of State Chuck Gray, and Right to Life of Wyoming, Inc.

**Pro hac vice application forthcoming*

**IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT
 IN AND FOR TETON COUNTY, WYOMING**

DANIELLE JOHNSON, et al.)	
)	
Plaintiffs,)	
)	
v.)	
)	
STATE OF WYOMING, et al.,)	
)	
Defendants,)	Case No. 18853
)	
and)	
)	
REP. RACHEL RODRIGUEZ-WILLIAMS,)	
REP. CHIP NEIMAN, SECRETARY OF)	
STATE CHUCK GRAY, and RIGHT TO)	
LIFE OF WYOMING, INC.)	
Proposed Intervenors-Defendants.)	

**MEMORANDUM OF WYOMING LEGISLATORS, WYOMING SECRETARY
 OF STATE, AND RIGHT TO LIFE OF WYOMING IN SUPPORT OF
 MOTION TO INTERVENE**

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INTRODUCTION

Proposed Intervenors—Individual Wyoming Legislators (“The Legislators”), Secretary of State Chuck Gray, and Right to Life of Wyoming (“RTLW”)—seek intervention to protect and defend their interests, which include preserving the authority of the Legislature to protect unborn life, to protect the health and safety of women, and to regulate the medical profession, as well as advocating for laws that respect the sanctity of human life. All of these interests are threatened by this action.

Until the United States Supreme Court created a federal constitutional right to abortion in *Roe v. Wade*, 410 U.S. 113 (1973), abortion was consistently a matter of legislative oversight in Wyoming and was not permitted except to save the life of the mother. *See, e.g.*, 1884 Terr. Wyo. Sess. Laws ch. 1, § 2. *Roe*, however, removed the issue from the province of state legislatures like Wyoming’s.

Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228 (2022), reversed *Roe*, declared that no federal constitutional right to abortion exists, and returned the issue to “the people and their elected representatives.” *Id.* at 2259. The people of Wyoming were ready: during the 2022 session, the Legislature passed House Enrolled Act 57 (“HEA 57”). Within HEA 57 was Wyoming Statute § 35-6-102(b), which limits elective abortion except in cases implicating sexual assault, incest, or the life or health of the mother.

Before the statute could go into effect, Plaintiffs brought suit, challenging the law under various theories. As part of their challenge, Plaintiffs introduced evidence and arguments purporting to show that the law would harm women, imperil doctors,

and violate a host of constitutional rights. In response, the Wyoming Attorney General mounted a defense, but on legal grounds alone; that defense did not include factual evidence or arguments to rebut Plaintiffs' submissions, on which the trial court relied in granting a temporary restraining order and then a preliminary injunction.

In March of 2023, seeking to rectify the alleged problems with HEA 57, the Wyoming Legislature passed House Enrolled Act No. 88 ("HEA 88"), which repeals HEA 57 and replaces it with a new law regulating abortion. HEA 88, § 5. Plaintiffs immediately brought suit, alleging that the new law violates the Wyoming Constitution. Am. Compl. ¶¶ xxv–xlii.

The Legislators, the Secretary of State, and RTLW seek intervention to introduce evidence in favor of HEA 88, and to provide this Court, and ultimately the Wyoming Supreme Court, the full record needed to properly adjudicate this case. More specifically, Proposed Intervenors intend to proffer evidence to counter Plaintiffs' arguments that HEA 88 is vague, that abortion on demand is a fundamental right in Wyoming, that abortion should be considered health care, that HEA 88 violates the right to religious freedom, and that HEA 88 violates equal protection.

As detailed below, the Legislators, the Secretary of State, and RTLW qualify under Wyo. R. Civ. P. 24 for both intervention as of right and permissive intervention. Proposed Intervenors have filed this motion in a timely manner, have a significantly protectable interest that may be impaired by the disposition of this action, and can

show that no existing party adequately represents their interests. Alternatively, Proposed Intervenors will assert defenses that share a common question of fact or law with the main action, and no delay or prejudice will result from their involvement.

In sum, under either pathway contemplated by Rule 24, intervention by the Legislators, the Secretary of State, and RTLW is legally and factually warranted. It is also prudential, because it promises to sharpen the adversarial process and augment the record as this case progresses to a resolution on the merits.

FACTUAL BACKGROUND

The Challenged Law

The Wyoming Legislature enacted HEA 88 during the 2023 Legislative Session, and it became law on March 17, 2023. In passing HEA 88, the Legislature chose a policy consistent with Wyoming's long (pre-*Roe*) history and tradition of protecting life from abortion. The Act declares that "the unborn baby is a member of the human race under article 1, section 2 of the Wyoming Constitution," and "that all members of the human race are created equal and are endowed by their creator with certain unalienable rights, the foremost of which is the right to life." Wyo. Stat. § 35-6-121(a)(i)–(ii). It then prohibits any person from knowingly "[a]dminister[ing] to, prescrib[ing] for or sell[ing] to any pregnant woman any medicine, drug or other substance with the specific intent of causing or abetting an abortion" or "[u]s[ing] or employ[ing] any instrument, device, means or procedure upon a pregnant woman with the specific intent of causing or abetting an abortion." Wyo. Stat. § 35-6-123(a).

The Act defines “abortion” as “the act of using or prescribing any instrument, medicine, drug or any other substance, device or means with the intent to terminate the clinically diagnosable pregnancy of a woman . . . with knowledge that the termination will, with reasonable likelihood, cause the death of the unborn baby.” Wyo. Stat. § 35-6-122(a)(i). Abortion does not include procedures performed to “[s]ave the life or preserve the health of the unborn baby,” “[r]emove a dead unborn baby caused by spontaneous abortion or intrauterine fetal demise,” “[t]reat a woman for an ectopic pregnancy,” or “[t]reat a woman for cancer or another disease that requires medical treatment which treatment may be fatal or harmful to the unborn baby.” *Id.* The prohibition also specifically exempts abortions performed to “prevent the death of the pregnant woman, a substantial risk of death for the pregnant woman because of a physical condition or the serious and permanent impairment of a life-sustaining organ of a pregnant woman,” to “[p]rovide medical treatment to a pregnant woman that results in the accidental or unintentional injury to, or death of, an unborn baby,” or “on a woman when the pregnancy is the result of incest . . . or sexual assault.” Wyo. Stat. § 35-6-124(a). The Act became effective immediately. HEA 88, § 8.

Plaintiffs’ Case

Plaintiffs brought suit in this Court on March 15, 2023, seeking declaratory and injunctive relief. They also filed a Motion for Temporary Restraining Order that same day. This Court held a hearing on the motion for a temporary restraining order on March 22, 2023.

Plaintiffs' amended complaint alleges that HEA 88 "is an unconstitutional intrusion into Wyomingites' privacy and fundamental Constitutional rights—rights of religious freedom, to make health care decisions, to self-determined family composition, and equal protection under the laws, among many others." Am. Compl. ¶ 23. It further alleges that HEA 88 is "unconstitutionally vague in that it is impossible to determine when the exceptions in the statute apply." *Id.* Plaintiffs challenge the clear import and direction of *Dobbs*, which not only declared that the U.S. Constitution contains no right to abortion, but also returned to the States decisions on the regulation of abortion. By Plaintiffs' telling, both *Dobbs* and HEA 88 are dead letters, because the Wyoming Constitution provides "guarantees [that] are more expansive than those secured by the Federal Constitution," Am. Compl. ¶ 51, such that abortion should suddenly be considered a fundamental right in Wyoming.

Taken together, Plaintiffs' challenge threatens the people of Wyoming's authority to protect the health, welfare, and safety of Wyoming citizens by limiting abortion, a power which was returned to them by *Dobbs*. Plaintiffs' challenge also threatens the Legislature's power to make laws generally, even when expressly authorized by a recent constitutional provision like Art. 1, Sec. 38, which provides the Legislature the authority to "determine reasonable and necessary restrictions on the rights granted under this section to protect the health and general welfare of the people." WYO. CONST. art I, § 38.

Proposed Intervenors

Individual Legislators

Representative Rachel Rodriguez-Williams is a member of the Wyoming House of Representatives who represents District 50. She was the main sponsor of HEA 88 and played an integral role in shepherding the law through to final passage and enactment.¹ Representative Williams has worked in the pro-life field for years, serving as the Executive Director of Serenity Pregnancy Resource Center. Serenity provides free medical services, support, and education to pregnant woman and their partners, from conception to delivery.² It offers alternatives to abortion and empowers mothers and fathers in crisis pregnancies to value and choose life in all circumstances.³ Serenity works with and has the support of many pro-life physicians in the community.⁴

Like many in the pro-life movement, Representative Williams is well-acquainted with alternatives to abortion like adoption and foster care, and several individuals in her family have been adopted, including some from the foster care system. By both personal vocation and legislative sponsorship, Representative Williams has a direct, significant, and unique interest in seeing that the law challenged by Plaintiffs is not only properly defended but sustained, because it is a

¹ State of Wyoming 66th Legislature, *House District 50: Representative Rachel Rodriguez-Williams*, <https://bit.ly/3mffyUO> (last visited April 6, 2023).

² SERENITY PREGNANCY RESOURCE CENTER, <http://bit.ly/413SEOW> (last visited April 6, 2023).

³ *Id.*

⁴ *Id.*

proper exercise of the Wyoming Legislature’s authority to exercise its powers to advance the health and welfare of Wyoming citizens, most notably women and unborn children.

Representative Chip Neiman is a member of the Wyoming House of Representatives who represents District 1. He was a co-sponsor of HEA 57 and thus also played an integral role in shepherding the law, including § 35-6-102(b), through to final passage and enactment.⁵ Representative Neiman has been a personal supporter of pro-life pregnancy centers for years, and has worked with nonprofit organizations helping to educate and support orphans. Like Representative Williams, he also has a direct, significant, and unique interest in seeing that the law, and by extension the Legislature’s authority to regulate on matters of health and safety, is not discarded but rather sustained and enforced.

Both Representatives have a particular interest in ensuring that their constituents’ permissible pro-life policy preferences—duly enacted by the Legislature—are given effect.

Secretary of State Chuck Gray

Before his election as Secretary of State, Chuck Gray served as a member of the Wyoming House of Representatives, representing the 57th district of Wyoming from 2017 to 2022.⁶ In describing his accomplishments in the Wyoming legislature,

⁵ State of Wyoming 66th Legislature, *House District 01: Representative Chip Neiman*, <https://bit.ly/40NDRBI> (last visited April 6, 2023).

⁶ State of Wyoming Legislator Profile, *House District 57: Representative Charles Gray*, <https://bit.ly/3ZNQfGU> (last visited Apr. 1, 2023).

Secretary Gray has highlighted his championing of several pro-life cases, such as sponsoring an ultrasound bill and passage of a budget amendment to prevent taxpayer funding of abortions through the University of Wyoming's student healthcare plans.⁷ Together with Representatives Williams and Neiman, then-Representative Gray co-sponsored House Bill 92, which limited the circumstances under which an abortion could be performed, to become effective upon certification by the Wyoming Attorney General of actions of the United States Supreme Court.⁸ Along with Representative Williams, Secretary Gray has also received the Wyoming Right to Life Platinum Award for his pro-life legislative advocacy; award criteria included the number of bills legislators sponsored and their voting records on abortion-related bills.⁹ The people of Wyoming elected Secretary Gray as a statewide constitutional officer after a legislative career advocating for pro-life policies. Like Representatives Williams and Neiman, Secretary Gray has an interest in seeing that the laws of Wyoming reflect the pro-life views of Wyomingites.

The Wyoming Secretary of State is statutorily obligated to preserve “[a]ll the public records, documents, acts and resolutions of the legislatures of the territory and state of Wyoming.” Wyo. Stat. § 9-1-302(a)(i). If the governor of Wyoming “is removed, dies, resigns or is unable to act,” the Secretary of State is first in the line of succession to act as Governor. Wyo. Stat. 9-1-211(a)(i). As Wyoming's custodian of legislative

⁷ Chuck Gray Secretary of State, *About Chuck Gray*, <http://bit.ly/40OF02m> (last visited Apr. 1, 2023).

⁸ BillTrack50, *WY HB0092*, <https://bit.ly/43a2MHN> (last visited Apr. 1, 2023).

⁹ *Wyoming GOP, Right to Life praise pro-life legislators for work on legislation*, WYOMING TRIBUNE EAGLE (April 25, 2021), <http://bit.ly/3mfX728>.

acts and the first successor as the chief executive of the State, Secretary Gray has a unique interest in preserving and enforcing the will of the people of Wyoming as duly enacted by their representatives in the Legislature.

Right to Life of Wyoming

RTLW is a pro-life, nonprofit organization whose mission is to educate the people of Wyoming concerning the reality and tragic consequences of abortion, infanticide, embryonic stem cell research, and euthanasia, including physician-assisted suicide. It exists to promote a culture of life from conception to natural death. A central part of RTLW's mission and purpose is to work towards achieving changes in the law so that the sanctity of human life is respected. Its longstanding support of pro-life efforts helped make HEA 88's passage a reality. RTLW has a direct, substantial, and unique interest in seeing HEA 88 upheld, and seeks intervention to ensure that its advocacy interests on behalf of women and unborn children are not wasted, but instead vindicated.

LEGAL STANDARD

Under Wyoming Rule of Civil Procedure 24, "the court must permit anyone to intervene who[:]"

1. files a "timely motion"
2. "claims an interest relating to the property or transaction that is the subject of the action"
3. "is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest," and
4. Is not "adequately represent[ed]" by "existing parties."

Wyo. R. Civ. P. 24(a); *Kerbs v. Kerbs*, 2020 WY 92, ¶ 12, 467 P.3d 1015, 1019 (Wyo. 2020). “Intervention of right is construed broadly in favor of intervention.” *Concerned Citizens of Spring Creek Ranch v. Tips Up, LLC*, 2008 WY 64, ¶ 14, 185 P.3d 34, 39 (Wyo. 2008) (“*Spring Creek Ranch*”) (quoting *Sierra Club v. United States EPA*, 995 F.2d 1478, 1481 (9th Cir.1993)). Also, where the underlying case is so important—as it is here—the “significant public interests” involved mean that “the requirements for intervention may be relaxed.” *San Juan Cnty., Utah v. United States*, 503 F.3d 1163, 1201 (10th Cir. 2007).¹⁰

In the alternative, a court may grant permissive intervention to “anyone . . . who . . . has a claim or defense that shares with the main action a common question of law or fact.” Wyo. R. Civ. P. 24(b)(1)(B); *Kerbs*, 2020 WY at 92, ¶ 12, 467 P.3d at 1019.

ARGUMENT

I. The Proposed Intervenors satisfy Rule 24’s requirements for intervention of right.

A. The motion to intervene is timely.

In assessing the timeliness requirement, courts consider four factors: 1.) the “length of time” the proposed intervenor “knew or reasonably should have known of

¹⁰ “In construing Wyoming rules of procedure, where Wyoming and federal rules of procedure are similar, [Wyoming courts] have repeatedly looked to federal cases construing the federal rule as persuasive authority.” *Johnson v. State*, 2009 WY 104, ¶ 14, 214 P.3d 983, 986 (Wyo. 2009) (citing *Bird v. State*, 901 P.2d 1123, 1129 (Wyo. 1995)). Here, because Wyo. R. Civ. P. 24 is essentially identical to its federal counterpart, federal precedent is persuasive, as is clear from the Wyoming Supreme Court’s repeated citation to federal authorities when adjudicating intervention matters.

its interest” before he filed his motion; 2.) “prejudice [to] the existing parties”; 3.) “prejudice [to]” the movant from being denied intervention; and 4.) any “unusual circumstances” weighing “for or against a determination” of timeliness. *Hirshberg v. Coon*, 2012 WY 5, ¶ 15, 268 P.3d 258, 263 (Wyo. 2012) (cleaned up). The timeliness factor involves a “determination of fact” and presents a “flexible’ question,” requiring courts to look at the “totality of the circumstances.” *Spring Creek Ranch*, 2008 WY 64, ¶ 15, 185 P.3d at 39 (citing 7A Wright & Miller, *Federal Practice & Procedure*, § 1916, at 572 (1972)). All four of these factors, along with the general principles guiding courts in making this determination, establish that this motion is timely.

First, this action is in its infancy, so there has been no delay in filing this motion.¹¹ Plaintiffs just filed their amended complaint March 21, 2023—just two weeks ago--and this Court held a TRO hearing on March 22, 2023. *See* Order Setting Emergency Hearing.

Proposed Intervenors began consulting with counsel and preparing papers to intervene once they became aware of the lawsuit and realized that their interests would not be fully and adequately represented by any existing parties. No serious argument can be made that they have been dilatory. *See, e.g., Kane Cnty., Utah v. United States*, 928 F.3d 877, 891 (10th Cir. 2019) (finding intervention motion timely when filed some three months after parties filed joint motion to stay); *W. Energy All. v. Zinke*, 877 F.3d 1157, 1164 (10th Cir. 2017) (finding intervention timely when

¹¹ Regardless, “delay in itself does not make a request for intervention untimely.” *Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, 619 F.3d 1223, 1235 (10th Cir. 2010).

conservation group moved to intervene more than two months after complaint was filed); *Sawyer v. Bill Me Later, Inc.*, No. CV 10-04461 SJO (JCGx), 2011 WL 13217238, at *3–6 (C.D. Cal. Aug. 8, 2011) (finding timely a motion to intervene filed one year after the case started, where court already ruled on motion to dismiss and choice-of-law arguments and document discovery had recently begun, and noting that other “district courts in the Ninth Circuit have regularly found motions to intervene timely in cases where the stage of the proceedings had advanced further than the instant case”).

Next, granting intervention will cause no prejudice to any of the parties. *Kane Cnty.*, 928 F.3d at 891 (finding meritless the objection that the parties will have to “respond to excess briefs,” and concluding that “the prejudice to other parties . . . [must] be prejudice caused by the movant’s delay, not by the mere fact of intervention”). But if their motion to intervene is denied, the Legislators, the Secretary of State, and RTLW will be unable to defend their particular interests, and they will be unable to bring their unique perspective, knowledge, and evidence to this Court, which has been tasked with adjudicating an issue of momentous importance to Wyoming citizens. No unusual circumstances militate against a finding of timeliness.

Thus, Proposed Intervenors satisfy the timeliness requirement.

B. The Proposed Intervenors have significant protectable interests in this matter, which include protecting the people of Wyoming's authority to regulate for health and safety, ensuring that women and unborn babies are protected in law, and vindicating the advocacy achievements of nonprofit organizations and votes of pro-life Wyomingites.

Although “[t]he contours of the interest requirement have not been clearly defined,” *Coal. of Ariz./N.M. Counties for Stable Econ. Growth v. Dep’t of Interior*, 100 F.3d 837, 840 (10th Cir. 1996), the interest inquiry “is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.” *Barnes v. Sec. Life of Denver Ins. Co.*, 945 F.3d 1112, 1121 (10th Cir. 2019) (cleaned up). It merely requires that a movant show a “significant protectable interest” in the matter, *Platte Cnty. Sch. Dist. No. 1 v. Basin Elec. Power Co-op.*, 638 P.2d 1276, 1279 (Wyo. 1982) (citing *Donaldson v. United States*, 400 U.S. 517 (1971)), which simply means “an interest that could be adversely affected by the litigation.” *San Juan Cnty.* 503 F.3d at 1199. This inquiry should be guided by the recognition that “Rule 24 traditionally has received a liberal construction in favor of applicants for intervention,” *Wash. State Bldg. & Constr. Trades Council, AFL-CIO v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982), as a result of “the broad right of intervention enacted by Congress.” *Coal. of Ariz.*, 100 F.3d at 841.

As to relevant comparators, in *Coalition of Arizona*, the Tenth Circuit found that a wildlife photographer, amateur biologist, and naturalist who had photographed and studied the Mexican spotted owl and lobbied for its protection had a “direct, substantial, and legally protectable” interest sufficient for intervention in a

case brought under the Endangered Species Act. 100 F.3d at 841. In *Washington State Building* the Ninth Circuit permitted a public interest group that sponsored a statute as a ballot initiative to intervene as of right in an action challenging the measure's constitutionality. 684 F.2d at 630. And in *Planned Parenthood v. Citizens for Community Action*, 558 F.2d 861, 869 (8th Cir. 1977), the Eighth Circuit found that a neighborhood association whose "purpose . . . [was] to preserve property values and insure that abortion facilities do not affect the health, welfare and safety of citizens" had a right to intervene in a challenge to a local law that imposed a moratorium on the construction of abortion clinics. In this case, the liberal construction of Rule 24, combined with these precedents, establish that Proposed Intervenors have a significant protectable interest.

1. The Legislators have a significant protectable interest.

The Individual Legislators are sponsors of a pro-life law passed by the Wyoming Legislature. Previously, under *Roe v. Wade*, the Legislature's authority to pass laws like HEA 88 was negated. Now, nearly fifty years later, the *Dobbs* decision has returned to all state legislatures, including Wyoming's, their rightful authority to reasonably protect the health and safety of women and unborn children. Yet Plaintiffs' suit threatens to again strip the Legislature of its legislative prerogative.

The Legislators have a significant protectable interest in defending their authority to make laws, which is the Legislature's reason for being. See WYO. CONST. art. II, § 1 ("The powers of the government of this state are divided into three distinct departments: The legislative, executive and judicial, and no person or collection of

persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.”).

The Legislators’ interest is all the more compelling given the nature of this case, because Plaintiffs argue that Art. 1, Sec. 38 of the Wyoming Constitution gives rise to a right to abortion. *See* Am. Compl. ¶ 15. Yet that provision, granting Wyoming citizens the “right to make [their] own health care decisions,” explicitly empowers the Legislature to “determine reasonable and necessary *restrictions* on the rights granted under this section to protect the health and general welfare of the people.” WYO. CONST. art. I, § 38 (emphasis added). In other words, Plaintiffs’ action not only threatens the Wyoming Legislature’s long-awaited authority to reasonably regulate abortion, but it does so by rejecting a separate constitutional grant of authority to the Legislature to regulate health and general welfare. The Legislators are “concerned persons,” *Barnes* 945 F.3d at 1121, who stand to be “adversely affected by the litigation,” *San Juan Cnty.* 503 F.3d at 1199, in more ways than one.

More specifically, the Individual Legislators have a significantly protectable interest in their particular role as sponsors of HEA 88, which they helped to draft, build coalition support for, and secure the passage of. Representatives Williams and Neiman crafted and lobbied for the legislation at issue; in doing so, they formally represented the interests of their constituents. Their ability to defend the law directly implicates the Legislators’ electoral interests and duties to the people who elected them to pass such laws.

This is all the more apparent under the persuasive authority provided by the *Coalition of Arizona*, *Washington State Building*, and *Citizens for Community Action* cases. If a naturalist who lobbied for an owl's protection under the ESA, and a public interest group who sponsored a challenged ballot initiative, and a neighborhood association concerned that an abortion clinic would affect public health and welfare, were all found to have significantly protectable interests sufficient to warrant a grant of intervention, the Legislators here must too, as they were not mere bystanders or interested private parties, but the very sponsors of the challenged law.

2. The Secretary of State has a significant protectable interest.

Similarly, Secretary of State Gray, as a longtime and prominent advocate for pro-life policies in Wyoming state government, has an interest in preserving the policy objectives for which he worked, and which the voters of Wyoming endorsed when they elected him to statewide office. While he was not a legislative sponsor of the particular bill that was codified and became the subject of this litigation, then-Representative Gray's zealous advocacy for related legislation during his tenure in the House helped construct the legislative foundation upon which HEA 88 was built. Secretary of State Gray's work to protect the unborn was such that he received the highest award for pro-life advocacy bestowed by the most prominent pro-life advocacy organization in Wyoming, fellow proposed Intervenor RTLW.

3. RTLW has a significant protectable interest.

RTLW exists to educate the public on the harm of abortion and to advocate for laws that protect women and their unborn children. The *Dobbs* decision and the

Wyoming Legislature's passage of HEA 88 represent the culmination of its many years of hard work as a pro-life nonprofit organization. Plaintiffs' case—by positing that an amalgam of Wyoming laws and constitutional provisions somehow create a state right to abortion which nullifies the Legislature's right to regulate abortion—threatens to undo all of RTLW's hard-won achievements in one fell swoop. Indeed, much like the intervenors in *Coalition of Arizona, Washington State Building*, and *Citizens for Community Action*, RTLW's advocacy efforts and all it has achieved are at stake here and will likely rise or fall with the Court's ultimate ruling on whether and how the Wyoming Constitution is interpreted to guarantee a right to elective abortion. RTLW's interest is therefore not only significant but “direct, substantial, and legally protectable.” *Coal. of Ariz.*, 100 F.3d at 841.

C. The disposition of this case may impair the Proposed Intervenor's ability to protect their interests.

“[T]he question of impairment is not separate from the question of existence of an interest,” and in making this determination courts are not “limited to consequences of a strictly legal nature.” *Nat. Res. Def. Council v. U.S. Nuclear Regul. Comm'n*, 578 F.2d 1341, 1345 (10th Cir. 1978). So, satisfying this factor is not a heavy lift. Indeed, “a would-be intervenor must show *only* that impairment of its substantial legal interest is *possible* if intervention is denied. This burden is *minimal*.” *Barnes*, 945 F.3d at 1123 (emphasis added) (cleaned up). These Proposed Intervenor's comfortably satisfy the impairment factor.

First, this case directly challenges the Legislators' authority to pass reasonable laws protecting life and health, and even to legislate as expressly permitted by Art. 1, Sec. 38 of the Wyoming Constitution.

Second, this case has the potential to harm the Legislators' prerogative regarding pro-life laws in the future. If HEA 88 is permanently enjoined, their ability to limit the harms of abortion may be greatly impaired, despite *Dobbs*, the longstanding history of Wyoming laws protecting unborn life, and the clear policy preferences of today's Wyoming voters. The Legislators therefore pass the impairment test. *See, e.g., W. Watersheds Project v. United States Forest Serv. Chief*, No. 20-CV-67-F, 2020 WL 13065066, at *3 (D. Wyo. July 29, 2020) (finding a group of outfitters showed impairment because the underlying action threatened to stop the supplemental feeding of elk, which could lead to the elk's starvation or movement elsewhere, thereby damaging the groups' use of "elk for aesthetic, conservation, and economic purposes"); *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011) (factor satisfied because if plaintiff prevailed, intervenor's "interest in conserving and enjoying wilderness in the Study Area may . . . be impaired").

Like the Legislators, RTLW's advocacy efforts are directly threatened by Plaintiffs' suit. If HEA 88 is permanently enjoined, RTLW's work on behalf of the law will have been squandered. RTLW therefore passes the impairment test. *See, e.g., Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983) (finding "no serious dispute" that intervenor wildlife organization had established impairment,

where it had participated in administrative process to create conservation area being challenged); *Idaho v. Freeman*, 625 F.2d 886 (9th Cir.1980) (holding that National Organization for Women had right to intervene in suit challenging procedures for ratification of proposed Equal Rights Amendment, which cause organization had championed).

D. The existing parties do not adequately represent the Proposed Intervenor's unique interests in guarding the legislative prerogative and in protecting the health of women and unborn children.

The Proposed Intervenor's burden as to this requirement is minimal, "in that [they] must only show that [their] interest *may not be* adequately represented." *Spring Creek Ranch*, 2008 WY 64, ¶ 20, 185 P.3d at 34 (citing *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1254 (10th Cir.2001)) (emphasis added); *see also Sanguine, Ltd. v. U.S. Dep't of Interior*, 736 F.2d 1416, 1419 (10th Cir. 1984) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972)) ("burden is . . . 'minimal' one of showing that representation 'may' be inadequate"). Further, a proposed intervenor "should be treated as the best judge of whether the existing parties adequately represent . . . [its] interests, and . . . any doubt regarding adequacy of representation should be resolved in [its] favor." 6 Edward J. Brunet, *Moore's Federal Practice* § 24.03[4][a] (3d ed. 1997); *see also In Def. of Animals v. U.S. Dep't of the Interior*, No. 2-10-cv-1852, 2011 WL 1085991 (Mar. 21, 2011 E.D. Cal 2011) (same).

Courts look to three factors to make this determination:

- 1) whether the interest of a present party is such that the party will undoubtedly raise the same arguments as the intervenor;
- 2) whether the present party is capable

and willing to make such arguments; and 3) whether the intervenor would offer any necessary elements to the proceedings that the existing parties would neglect.

Spring Creek Ranch, 2008 WY 64, ¶ 20, 185 P.3d at 34 (quoting *Or. Env't Council v. Or. Dep't of Env't Quality*, 775 F. Supp. 353, 358-59 (D.Or.1991)). All three factors establish inadequate representation here.

1. The Attorney General will not “undoubtedly raise the same arguments” as Proposed Intervenors.

It is clear from the Attorney General's previous briefing in Plaintiffs' challenge to Wyoming's trigger law, as well as its arguments in that case, that its focus in defending the law has been a strictly legal one. Proposed Intervenors believe that the defense of HEA 88 can be made more complete by submitting factual evidence in support of the new law. The Legislators, the Secretary of State, and RTLW plan to offer evidence to rebut Plaintiffs' claims that elective abortion is healthcare, that the law harms women and imperils their doctors, and that Art. 1, Sec. 38 of the Wyoming Constitution confers a right to abortion, which will augment the defense of HEA 88 and at the same time fully inform this Court of the implications of ruling favorably on Plaintiffs' challenge.

For instance, the Proposed Intervenors would proffer evidence showing that the Constitution's protections for health care decision making do not, and never were understood to, create or protect a right to elective abortion in Wyoming. Proposed Intervenors would also proffer medical and other evidence to show that the law is not vague because doctors routinely—as part of standard of care and informed-consent procedures—assess the risks of medical procedures and conditions. That these

standards are contained and defined in Wyoming's Civil Pattern Jury Instructions illustrates that Plaintiffs' vagueness allegations are unfounded. *See* Rule 14.02-03 (standard of care defined); 14.06 (informed consent defined). Proposed Intervenors would bring forth information and arguments relevant to Plaintiffs' vagueness challenge on reasonable medical judgment, on obstetric and gynecological care, and on pregnancy complications and treatment.

Finally, the Proposed Intervenors would provide expert evidence and testimony to show the harms to women and unborn children from abortion itself, which would rebut the claim that elective abortion should be considered health care. The Proposed Intervenors are well suited to do so because of their long history of work, relationships, and expertise built specifically on the issue of abortions' harms. This additional argument and evidence would also provide a more complete defense to Plaintiffs' attempt to use Art. 1 Sec. 38 to create a right to abortion where none exists under Wyoming law.

2. The Attorney General will not make the arguments the Proposed Intervenors plan to make.

In Plaintiffs' prior case challenging the trigger law, and in the TRO hearing in this case, the Attorney General introduced no evidence to rebut Plaintiffs' evidence. *See* Tr. on Hr'g for TRO (July 27, 2022) at 4 (indicating that the Court would "rely on [Plaintiffs'] affidavits," the Attorney General had "no objection" to their consideration and revealing it had not introduced any affidavits of its own). Yet this Court in the original case relied on Plaintiffs' evidence to grant a preliminary injunction against the law, Order Granting Motion for Preliminary Injunction (Aug. 10, 2022) ¶¶ 15, 27,

38. Moreover, in this case, the Court suggested it needed evidence from the parties to rule on the questions raised. Tr. on Hr'g for TRO (March 22, 2023) at 97. It is likely that the Attorney General will take the same approach in this case. *Id.*, at 48 (arguing that “constitutional issues are questions of law and . . . evidentiary facts[] are not relevant to that inquiry”); 50 (arguing that a legislature’s statement purporting to interpret the Wyoming constitution “doesn’t open the door to a factual inquiry”).

This disparity in strategy alone is enough to satisfy this factor. *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 824 (9th Cir. 2001) (“It is sufficient for Applicants to show that, because of the difference in interests, it is likely that Defendants will not advance the same arguments as Applicants.”). Unless the Proposed Intervenors are granted intervention, there may not be any rebuttal evidence on the record to counter the harms, vagueness, and health care decision-making arguments raised by Plaintiffs. This evidentiary gap bolsters the conclusion that the Attorney General will not make all the arguments Proposed Intervenors will.

At the TRO hearing in this case, counsel for Plaintiffs argued extensively about the heavy weight Plaintiffs suggest this Court place on facts, including that the Court should consider their factual submissions in light of a Wyoming Supreme Court request for additional factual development, Tr. on Hr'g for TRO (March 22, 2023) at 79–80; that the terms of the legislation are impermissibly vague, *Id.* at 82–83; that Wyoming women will be harmed by the statute, *Id.* at 84; that the statute is not narrowly drawn to serve a legitimate government interest, *Id.* at 88; that the recent amendment to the Wyoming Constitution “merely codified a preexisting natural

right” to abortion, *Id.* at 89; that the purpose of the statute “is to further a distinctly [Christian and Catholic] viewpoint that life begins at conception,” *Id.* at 91–93; and encouraging the Court to apply the defunct fact-intensive *Lemon* test¹², *Id.* at 92. Invited by the Court to rebut these arguments, counsel for the Attorney General replied, “I think suffice it to say I disagree with just about everything she said, but we’re pretty late in the day and I don’t know that it’s going to benefit the Court if I go through and take on point by point.” *Id.* at 95.

Proposed Intervenors respectfully submit that this response does not suffice, and if granted intervention would provide evidence and argument to defend their interests and rebut the Plaintiffs’ claims.

3. The Proposed Intervenors will offer necessary elements the Attorney General does not plan to.

A proposed intervenor can satisfy this factor by showing it will offer “necessary elements to the proceeding that other parties would neglect.” *Arakaki v. Cayetano*, 324 F.3d 1078, 1087 (9th Cir. 2003). The Proposed Intervenors will provide evidence and legal argument to rebut Plaintiffs’ submissions on harm, vagueness, and the import of Art. 1, Sec. 38. The elements the Proposed Intervenors plan to introduce and address are necessary to complete the defense of HEA 88.

Proposed Intervenors together have abiding interests in protecting women and unborn children. The Legislators have an ongoing interest in protecting their

¹² *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Plaintiffs urge the Court to apply the *Lemon* test even though the U.S. Supreme Court has “long ago abandoned *Lemon* and its endorsement test offshoot,” *Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407, 2428 (2022) (citing *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2079–81 (2019)).

authority to regulate on abortion and related issues. RTLW has an interest in ensuring that its advocacy efforts on behalf HEA 88 are fully defended and vindicated. These interests include, but also diverge from, the current State Defendants' more circumscribed interest in defending HEA 88. This, along with the fact that Proposed Intervenors will raise significant and necessary arguments in the proceeding, shows that they are not adequately represented. *See, e.g., Utah Ass'n of Counties*, 255 F.3d at 1254 (“possibility that the interests of the applicant and the parties may diverge need not be great in order to satisfy this minimal burden”) (cleaned up); *Pennsylvania v. President U.S. of Am.*, 888 F.3d 52, 61–62 (3d Cir. 2018) (finding inadequate representation even where the government was tasked with defending regulations, because the interests at stake, while “related,” were not “identical”).

The U.S. Supreme Court has confirmed that intervention of right is warranted where, as here, a proposed intervenor has raised “sufficient doubt about the adequacy of representation[.]” *Trbovich*, 404 U.S. at 538. In *Trbovich*, the official prosecuting the law was “performing his duties, broadly conceived, as well as can be expected,” but the Supreme Court recognized that the individual whose interests were at stake may have valid concerns about deficiencies in the official’s representation and may not take “precisely the same approach to the conduct of the litigation.” *Id.* at 539; *see also Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 967 (3d Cir. 1998) (finding inadequacy of representation where intervenor raised “reasonable doubt whether the government agency would adequately represent [its] concerns”). The same concerns

present in *Kleissler* and *Trbovich* obtain here, where there is surely “reasonable doubt,” based on the State Defendants’ decision not to introduce evidence in the prior case or the TRO hearing in this case, whether the Attorney General’s office will adequately represent Proposed Intervenors’ interests here; and it appears beyond doubt that the existing State Defendants and Proposed Intervenors will take a different “approach to the conduct of the litigation.” Inadequacy of representation is therefore established.

The Proposed Intervenors have shown that they have a significant protectable interest that would be impaired by the outcome of this litigation and have further shown that no existing party adequately represents their interests. Permitting intervention comports with Rule 24. It will also enhance judicial economy, because the Proposed Intervenors will help complete the record for both this Court and the Wyoming Supreme Court, making a final resolution on the merits a much less protracted affair.

II. The Proposed Intervenors should be granted permissive intervention.

“Intervention may be allowed permissively when the intervenor’s claim or defense has a question of fact or law in common with the main action and the court in its discretion determines intervention will not unduly delay or prejudice the adjudications of the rights of the original parties.” *Masinter v. Markstein*, 2002 WY 64, ¶ 6, 45 P.3d 237, 240 (Wyo. 2002). Based on these guideposts, the Legislators, Secretary of State, and RTLW satisfy the requirements for permissive intervention.

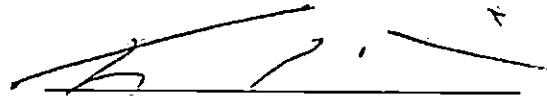
Their motion is timely, *see supra* Part I.A, and they have a question of fact or law in common with the main action, because their defenses will be “directly responsive to the claims . . . asserted by [P]laintiffs.” *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1110 (9th Cir. 2002) (commonality standard satisfied). Those defenses will include relevant evidence and argument on the benefits and constitutionality of HEA 88, and the harm that results when elective abortions are mistakenly viewed as ordinary health care. Finally, granting intervention will not “unduly delay or prejudice the adjudication of the rights” of either Plaintiffs or the existing State Defendants. *Spring Creek Ranch*, 2008 WY 64, ¶ 23, 185 P.3d at 42; *see supra* Part I.A. If anything, permitting intervention will ensure that the upcoming evidentiary hearing or trial will provide this Court, and by extension the Wyoming Supreme Court, with the adversarial completeness needed to render a fully informed decision on the merits. For these reasons, permissive intervention is also appropriate.

CONCLUSION

The Proposed Intervenors have unique and significant protectable interests at stake, interests which no existing party is situated or willing to defend. Rule 24 broadly favors intervention, and the liberal construction courts routinely apply is even more fitting here, because this case implicates an issue of the utmost public importance. *See San Juan Cnty.*, 503 F.3d at 1201 (“significant public interests” mean “requirements for intervention may be relaxed”). For these reasons, the participation of the Proposed Intervenors is not only required but prudent. The Individual Legislators, Secretary of State Gray, and RTLW therefore respectfully request that

this Court grant them intervention as of right, or in the alternative, permissive intervention.

RESPECTFULLY SUBMITTED this 6th day of April, 2023.



Frederick J. Harrison #5-1586
Frederick J. Harrison, P.C.
1813 Carey Avenue
Cheyenne, Wyoming 82001
307-324-6639

Denise M. Harle, GA Bar No. 176758*
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd NE, Suite
D-1100
Lawrenceville, GA 30043
(770) 339-0774
dharle@adflegal.org

*Attorneys for Proposed Intervenors
Rep. Rachel Rodriguez-Williams, Rep.
Chip Neiman, and Right to Life of
Wyoming*

**Pro hac vice application forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April 2023, a true and correct copy of the foregoing document was email filed with the Teton County District Court. It was also served upon the following person(s) in the following manner as indicated:

John H. Robinson
Marci C. Bramlet
Robinson Welch Bramlett, LLC
172 Center Street, Suite 202
PO Box 3139
john@lawrwb.com
marci@lawrwb.com

U.S. Mail
 Hand delivered
 Court Mailbox
 Email

Erin E. Weisman
Teton County Attorney's Office
P.O. Box 4068
Jackson, WY 83002
eweisman@tetoncountywy.gov

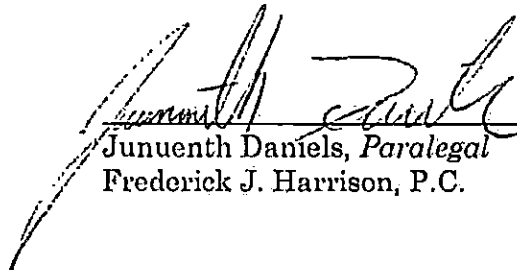
U.S. Mail
 Hand delivered
 Court Mailbox
 Email

Lea M. Colasuonno
Town of Jackson
P.O. Box 1687
Jackson, WY 83001
lcolasuonno@jacksonwy.gov

U.S. Mail
 Hand delivered
 Court Mailbox
 Email

Jay Jerde
Special Assistant Attorney General
Wyoming Attorney General's Office
109 State Capitol
Cheyenne, Wyoming 82002
jay.jerde@wyo.gov

U.S. Mail
 Hand delivered
 Court Mailbox
 Email


Junuenth Daniels, *Paralegal*
Frederick J. Harrison, P.C.